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Office-Supreme Court,
FILED
MAR 27 1969
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Number 9 Original

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, ET AL.

Petition for Rehearing by the State of Louisiana of its Motion for Entry of Supplemental Decree No. 2; and for Rehearing of its Alternative Motion for Entry of Supplemental Decree No. 2

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Petition for Rehearing by the State of Louisiana of its Motion for Entry of Supplemental Decree No. 2; and for Rehearing of its Alternative Motion for Entry of Supplemental Decree No. 2

Pursuant to Supreme Court Rule 58 the State of Louisiana respectfully prays for a rehearing of its Motion for Entry of Supplemental Decree No. 2 and of its Alternative Motion for Entry of Supplemental Decree No. 2 in the case of *United States v. Louisiana*, et al., Number 9 Original, October Term 1968 decided by this Honorable Court on the third day of March 1969, for the following reasons:

1.

Louisiana respectfully submits that the Court erred in not recognizing as the line marking the seaward limit of inland waters for the purposes of the Submerged Lands Act that line which has been marked, designated and defined by agencies of the United States government pursuant to the Act of Congress of Feb-

ruary 19, 1895 as the line dividing the high seas from rivers, harbors, and inland waters.

2.

Louisiana also submits that the Court erred in applying to the unique coast of Louisiana the narrow interpretation of general principles of international law advanced by the Solicitor General which generally are used to contract the territory of the United States and which amount to disclaimers of American territory contrary to the interest of this nation, which contraction is beyond the authority of the Solicitor General to make.

3.

The Court in sustaining the position of the Solicitor General in opposition to the principal "Inland Water Line" claim of Louisiana has done so in an erroneous belief that the Court is bound by its decision in *United States v. California*, 381 U. S. 139.

4.

The Court in its ruling on fringes of islands erred both in ruling that such islands cannot form the perimeter of a bay and in stating that Louisiana did not contend that any of the formations in question is an integral part of the mainland.

5.

It is respectfully submitted that the Court also erred in not giving any ruling useful to a Special Master on what he is to do in regard to the revenues accru-

ing before the drawing of the present coastline in situations where, owing to the formation or destruction of certain land forms, ownership of some submerged lands may have shifted from the federal to the state government or *vice versa* since the passage of the Submerged Lands Act effected or confirmed a division of off-shore lands between the state and federal government.

6.

Louisiana also respectfully urges that the Court erred in ruling only upon the effect of the Act of February 19, 1895, 28 Stat. 672, 33 U.S.C. 151-155, as the sole assertion of jurisdiction over certain waters and has not given any ruling useful to a Special Master on the effect of that act when cumulated with other assertions of jurisdiction in establishing claims to historic waters.

7.

Louisiana respectfully submits that this Court erred in its interpretation of the significance of the semi-circle test.

8.

It is respectfully submitted that the Court erred in not recognizing the dredged channels on Louisiana's coast as outermost permanent harbor works whence the territorial sea is measured.

The grounds of the foregoing assignment of errors are:

Inland Water Line

In *United States v. State of Louisiana*, et al., 363 U. S. 1, 121, the Solicitor General argued that the executive branch of our government has consistently claimed a territorial sea of only three miles, that principles of international law governed this purely domestic dispute and hence, notwithstanding the clear language of the Submerged Lands Act, no state could have a claim to mineral resources more than three miles from its coast. This Court recognized the Solicitor General's argument was merely a repetition of arguments made by officials of the State Department to Congress while hearings on the bill were being held.

The Court noted the argument of the government "that because of federal supremacy in the field of foreign relations, this Court must hold that the Executive policy of claiming no more than three miles of territorial waters . . . worked a decisive limitation upon the extent of all state maritime boundaries for purposes of this Act," 363 U. S. 32 and 33, but the Court rejected it and held that "in light of the purely domestic purposes of the Act, we see no irreconcilable conflict between the Executive policy relied on by the Government and the historical events claimed to have fixed seaward boundaries for some states in excess of three miles." (See page 33.) The Court then further held:

> We conclude that, consonant with the purpose of Congress to grant to the States, subject to the three-league limitation, the lands they would have owned had the *Pollard* rule been held applicable to the marginal sea, a state territorial boun-

dary beyond three miles is established for the purposes of the Submerged Lands Act by Congressional action so fixing it, irrespective of the limit of territorial waters. (p. 35-36.)

The Court correctly held that the division of the mineral resources of the continental shelf between the federal and state governments was the function of Congress which alone has the right to dispose of national property claims. For this reason it is erroneous to effect that division on the basis of selected provisions of the Convention on the Territorial Sea and Contiguous Zones which was adopted for other purposes long after the Submerged Lands Act was passed.

We recognize the apparent problem presented by the second California case, *United States v. California*, 381 U. S. 139, but there the Court utilized the Convention for two reasons only. First, there was an absence of any other guide. Second, it seemed to the Court to afford a practical and useful solution of the facts then presented. Since neither of these reasons is present in the case of Louisiana, as is pointed out in the dissent by Justice Black, the *rationes decedendi* of the *California* case should not control in this litigation.

In the California decision the Court stated that Congress had not defined inland waters because it believed that term had been defined in "prior Court opinions" (p. 151). It was on this understanding that Congress deleted an explicit definition of inland waters from the Submerged Lands Act. The Court added (p. 157) that "Congress could have defined inland waters

as it wished for the purely domestic purposes of the Submerged Lands Act."

While seeking a definition of inland waters, this Court was also seeking definiteness and stability. Indeed, the Court said, "Expectations will be established and reliance placed on the line we define." (p. 166) To this we add that expectations were established by the Submerged Lands Act and Congress' belief that this Court had previously established the meaning of inland waters.

This Court also said that "[a]llowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act grant would substantially undercut the definiteness of expectation which should attend it." The Court rejected this possibility in order "to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States," (p. 166-67).

In the *California* case, such partial inland water line as had been established by the federal government was far inland of the claims made by California, but the United States Solicitor General, mindful of the Louisiana situation as he admitted, chose not to claim the benefit of such line as had been marked. Thus, one of the litigants in *this* case sought to make a precedent for use against Louisiana in the *California* case where Louisiana was not represented. The Court, finding no definition in the Submerged Land Act, having no Inland Water Line definition urged by a litigant,

and finding no definition in its prior decisions despite the belief of Congress to the contrary, had either to decline to act or perforce to find a definition. However that necessity is absent here.

Congress considered the records and reports of earlier Submerged Lands bills while it was considering S.J. Res. 13 in the 83rd Congress. The records of these hearings and reports, as well as the record and report of S.J. Res. 13, show unmistakably that after Louisiana pointed out to the Congress its earlier reliance upon "coast" as used in the Act of February 19, 1895, Congress ceased to refer to "shores" as the place whence the grant or quitclaims were to be measured and began to use the term "coast" instead.

It is a matter of record that Senator Anderson, to whose statement the Court refers on p. 6 of its decision, consistently opposed the efforts of Congress to modify the effect of the first California decision and opposed the bill which became the Submerged Lands Act. We respectfully submit that a comment by an opponent of a bill which is passed in spite of his opposition is no evidence of the intent of Congress in passing that bill.

In the choice between a definition of inland waters based on a line designated and defined by the federal government as marking the outer limit of inland waters and one suggested by International Convention, the Court erred in accepting the latter for the Court had recognized this as being a purely domestic matter.

The Court refers on page 13 of its opinion to disclaimers during the past 25 years by federal agencies

of the benefit of the line marked pursuant to the Act of February 19, 1895. We ask the Court to remember that it is within the past 25 years that the federal government first denied that the States had any claims to any areas off their coasts, first asserted a federal belt around the States which this Court had earlier declared not to exist, and first extended its own claims by assertions of rights to the Continental Shelf.

For at least 39 years prior thereto, the so-called navigation line was recognized as marking inland waters. *The Delaware*, 161 U. S. 459. In view of the dual belief of Congress that only legislation could resolve the federal-state dispute[1] and that the court was to follow its own established case law, it is clear that the Court should have held that *The Delaware* controls the case at bar. *The Delaware* followed a legislative resolution as to the location of inland waters and was the only prior decision of this court dealing with coastal inland waters. The case of *United States v. Newark Meadows Imp. Co.*, 173 F. 426, dealing only with a question of venue does not and could not gainsay the decision of this Court. See page 15 of the opinion of the Court.

We respectfully submit that "disclaimers" by one of the parties to this litigation which in fact amount to the enlargement of claims against the other litigant are entitled to no weight.

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[1]H. R. Rep. 215, 83rd Cong., 1st Sess., p. 12, Appendix. "All agree that only the Congress can resolve the long-standing controversy between the States of the Union and the departments of the Federal Government over the ownership and control of submerged lands."

The suit of the United States against Louisiana was not instituted for the purpose of giving away American territory but only to enrich the federal government at Louisiana's expense. In this respect Justices Black and Douglas noted:

> Although the value of all of the submerged lands probably could be stated only in astronomical figures, this dispute is a minor one involving only a comparatively small segment of land adjacent to Louisiana. (See Dissenting Opinion, page 1).

The accumulation of payments made by oil companies for leases and rentals and royalties since 1956 amounts to about one billion dollars. As vast as this is to individuals, it represents federal expenditures for only three or four days, and for that matter, Louisiana expenditures for about a single year. The resources are American, whether federal or state. As Justices Black and Douglas said, this is "an issue that can well be characterized as de minimis so far as the practical effect to the United States is concerned."

However, the method used by the Solicitor General to gain funds for the federal government is to surrender American territory or to disclaim areas long considered to be American territory. This is not *de minimis*. The Court recognized that the line advocated by the federal government may be substantially inconvenient and states that "there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties." (Page 20.) We believe this statement to

be correct. However, because we believe the area to be American territory, we suggest to the Court that *only the insistence of the Solicitor General* that the line designated and defined by the federal government is drawn in the high seas and not at the outer limit of inland waters as stated in the statute, and the approval of that contention by this Court, make any such legislation or agreement necessary.

If indeed, this contested area is not American territory, let us consider the effect of an agreement or legislation. We believe it would surely be effective as to the minerals of the Continental Shelf, but what of the line for all other purposes? Oil and gas now seem so important as to lead the Solicitor General to avow disclaimers of territory to get these minerals for the federal treasury. In the years to come, however, the rejection, surrender or disclaimer of American territory will surely prove to have been too high a price to pay for such advantage in an internecine conflict. We earnestly urge the Court not to lend its prestige to such an argument which can never aid our nation in any way internationally, but could be exploited as a declaration against our national interests at some future date.

Louisiana does not agree that the Solicitor General of the United States had the authority in the *California* case or has the authority in this case to disclaim American territory. Louisiana notes reference by the Court to lay writers as supporting such action and particularly to Mr. Shalowitz, Special Assistant to the United States Department of Commerce. See page 15

of the opinion, note 35. Louisiana respectfully submits that Mr. Shalowitz's opinion was expressed in a book published in 1962 in the middle of this litigation. It might be considered a supplement to the Solicitor General's brief but it cannot be considered as impartial authority upon which to base a decision adverse to Louisiana.

The Court refers to the enactment by Congress in 1948 and in 1953 and in 1951 and in 1963 of statutes relating to inland and international rules as indicative of Congressional approval of disclaimers of American territory by subordinate functionaries and we think the Court erred in treating this as sufficient to divest the nation of American territory where no nation has as yet challenged this country's dominion.

On page 19 of its opinion the Court refers in note 40 to the Congressional committee report in 1953 referring to the "startling difference between the shore and coast line of Louisiana and Florida on the one hand and that of Texas and California, on the other hand. To say that these contrasting coastal states should be treated exactly alike with reference to the definition of inland waters would ignore geographical factors that are wholly different." The Court says that the committee recommended that Congress adopt general guidelines for the definition of inland waters and then delegate the task of drawing exact boundaries to a special committee and that Congress did not accept this latter recommendation. This does not challenge the geographical differences. If the Court was free to adopt international conventions not then in existence

as a substitute for definitions which the Congress believed this Court had already incorporated into its jurisprudence, certainly the Court is not thereby required to use that definition to the prejudice of the nation with respect to the Gulf Coast.

We do not believe this Court is bound by the second *California* case. "Precedents should be overruled when they become inconsistent with present conditions," as Justice Holmes wrote in *The Common Law.* (p. 126.) But it is not necessary to overrule the California decision to protect the nation, albeit aiding the Louisiana fisc in this case.

The Court noted on page 18 of its opinion the shifting effect caused by the Mississippi River and the violent Gulf storms which "remold the soft, silt-like delta soil." The Court said also on page 57 of the opinion "we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, ..."

None of this was factually applicable to the *California* case; and when Court and Congress agree that there are vast physical differences between the California and Louisiana coastal areas, there is no reason why the Court should feel itself bound to apply a wholly inappropriate set of rules simply because the *California* case involving a smooth and uncomplicated coastline reached the Court ahead of this very different one.

We must believe that considerations such as these led the Court to suggest agreement or legislation to which we have referred. See page 20 of the opinion.

Louisiana points out that Congress has been aware since 1954 of the approval and acceptance by Louisiana of the coastline designated and defined by agencies authorized by Congress to do so through reports which must under law be filed with Congress by the officials who have designated and defined and marked this line. Congress has never acted to reject Louisiana's acceptance. Thus, Louisiana considers that an "agreement" to freeze as of that time, which is precisely what this Court now says can be done, has already been done pursuant to the specific authority of Congress in Section 4 of the Submerged Lands Act. That section authorizes any state "admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, *or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries.* Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries *is approved* and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line." (Emphasis ours.)

Hence, Louisiana contends that the agreement which the Court says Louisiana could make with the national government has in fact been made.

The Solicitor General is not responsible "for the formation and implementation of foreign policy." (See p. 57-58) He should not be permitted to disclaim American rights to straight base lines such as the one

heretofore drawn on the Louisiana coast by federal agencies.

If it be agreed that the line was drawn for navigational purposes we refer to the opinion of Justices Black and Douglas:

> International and local rules of navigation are serious business and the warnings put out under order of Congress to inform ships of where inland waters begin must be acted on and obeyed. Here Louisiana's waters have not only been marked but Louisiana passed Act 33 of 1954 accepting these governmental markings as showing positively and certainly just where its inland water line is located. (See p. 10.)

We add only that the right to draw this line was based upon American sovereignty and not upon some international convention—and that it was based upon our own coastal interests.

The object of the Court in the *California* case was to select "the best and most workable definitions available," adding "stability" to the operation of the Submerged Lands Act. As noted in the dissenting opinion "if that turns out to be the result of using the treaty definitions in the second *California* case, it will certainly not be the result here, for there are great crucial differences between the two coasts."

At the conclusion of its opinion the Court put a limit upon what it called the United States disclaimer in these words:

> The United States disclaimer [in the *California* case] was credited only because the case presented such "questionable evidence of contin-

uous and exclusive assertions of dominion." 381 U. S., at 175. And we noted that we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." *Ibid.* Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.

While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title. The convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in *United States v. California*, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events.[104] The only fair way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case.

[104]It is one thing to say that the United States

should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of an historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California*. See n. 97, *supra*.

The Court has set a limit to the extent of American territory which the Solicitor General, in the name of the United States, may disclaim or abandon by emphasizing the "impermissible contraction of territory against which we cautioned in *United States v. California*." The difference between the view asserted for Louisiana and the view asserted by the Court is that Louisiana contends it is beyond the power, beyond the authority of the Solicitor General in the name of the United States, to contract the territory of the United States at all.

Finally, Louisiana welcomes the opportunity to protect the historic title of the United States to waters to which no foreign power has ever asserted a claim against the United States or any of Louisiana's previous sovereigns. We do not believe that the Solicitor General or anyone acting for him should be allowed to strip the United States of this territory by opposing Louisiana's claims as if he were acting for a foreign power hostile to the United States.

Louisiana most sincerely, respectfully and strenuously urges that the Court's opinion in this purely

domestic matter should not be couched in terms which could be used as a precedent *against* this nation in its conduct of foreign affairs.

Fringes of Islands

In discussing fringes of islands the Court made an observation in passing in footnote 88 that "Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description."

However the Court erred in its reading of our contentions in this respect. On page 57 of our Reply Brief we stated:

> The federal government's avowed position regarding islands forming part of the perimeter of a bay is also inconsistent with its practice. We have pointed out several instances in which the United States has actually selected island headlands. In each of these the island must form part of the perimeter of a bay, albeit small part. Of course, the instances in which the United States has done this are restricted to those in which the island-headland may be said to form an integral part of the mainland. From the numerous instances which Louisiana has found in international law where it has been recognized that the perimeter of a bay may be partially formed by islands, (see pp. 116-121 of Louisiana's Brief) the principle does not appear to be restricted to such instances. *However, if one examines the instances in which Louisiana has applied the principle that islands may form the perimeter of a bay it appears that most of them are instances where*

> *the entire insular perimeter of the bay forms an integral part of the land form. For example, those islands forming the southern perimeter of Caillou Bay appear to be clearly an integral part of the land form.* They are just as closely connected with each other as the islands of the St. Bernard peninsula, which the federal government asserts must be considered a single land formation. . . . (Emphasis ours.)

This inadvertent misreading by the Court is particularly unfortunate in view of the Court's choosing Caillou Bay in footnote 87 as the first example of a place where there was an island fringe which the Court in footnote 88 states that Louisiana does not contend to be an integral part of the land form. As the excerpt from our Reply Brief demonstrates, Louisiana expressly contended that Caillou Bay's fringe of islands did form an integral part of the land form.

Of course Louisiana feels that the Court erred in holding that an island fringe not an integral part of the land form cannot form the perimeter of a bay. All the international law authorities which we could find were in agreement with Louisiana's contention and the federal government's brief is void of citation to authority to support its contention. However, Louisiana feels confident that it could establish that most of her island fringes are an integral part of the mainland form as a matter of fact, were it not for the Court's erroneous dictum that we did not view any of our insular perimeters of bays as such. Louisiana submits that the question of whether these islands are an integral part

of the mainland form is as much an issue of fact as the other issues which the Court is referring to a Master and should be left to that Master's determination. Of course we recognize that the Court has left open to us the possibility of proving that the federal government had drawn straight baselines connecting island fringes sometime before this stage of the lawsuit and Louisiana certainly feels that the history of the treatment accorded these island fringes would support such a contention. Nevertheless we do not think that justice would be served by this Court's placing a somewhat more onerous burden of proof upon us on the basis of a misreading of our briefs.

Former Elevations

As discussed in note 48 of the Court's "ambulatory" ruling as to the effect of the Geneva Convention, we recognize that changes in the physical shore would effect changes in the coastline, if the Inland Water Line is rejected. However, we respectfully submit that unless an entirely new expensive and time consuming survey is to be made of the entire coast, the only practical way to proceed before the Master is on the basis of the already completed survey cooperatively financed by both parties. Even if an entirely new survey were made it would be necessary at some point for the Court or the Master to hold both parties bound by the survey as made at some point in time until the coastline could be drawn once so that there would be a point of departure for considering subsequent changes. Otherwise the parties will be continually arguing that Louisiana's

true coast had shifted since the last survey, even if that survey were completed the day before.

Therefore, to avoid endless protraction of the litigation, the Court should modify its opinion to make clear that the Special Master is to apply the set of 54 maps, which reflect the 1959-1960 survey findings, except to the extent that said maps may be proven erroneous or incomplete *as of the time of the making* of the survey.

Leaving aside the question of historic waters, if Louisiana's coastline is to be drawn *now* on the basis of the Geneva Convention in applying the specific criteria in it governing matters other than historic waters, and if the Master is not to take into account formations proved to be no longer existing, nevertheless the Court should instruct the Special Master as to what he is to do if it is proved that a land formation that did exist has since ceased to exist, or, for that matter one has come into existence. The Submerged Lands Act immediately vested title in the state to those submerged lands within three miles of any land formation. Therefore, as to the Pass Tante Phine spoil bank, for example, if in fact it no longer exists, and if the first proof of its destruction is in 1968, Louisiana should be recognized as entitled to all revenue in the area lost by its destruction, up until the time of that destruction, in 1968. Conversely if the federal government can prove that some land formation came into existence *after* the passage of the Act thus giving Louisiana claim to more submerged lands that it had hitherto the government should be permitted to claim revenue

produced from the submerged lands in question before the existence of the land formation: To hold otherwise would be to impose liability for trespass or conversion where in fact no trespass or conversion had occurred. Nothing in the Court's latest opinion in this case furnishes a guide for the Master in this respect. If he is to be appointed the Court should instruct him in this matter or else the determination of Louisiana's ambulatory coastline, difficult at best, may prove literally impossible.

Historic Waters

In its last briefs Louisiana presented two entirely separate and distinct arguments as to where her coastline is located. As mentioned above Louisiana contends that the Court is in error in ruling that the Inland Water Line is not the coastline of Louisiana for purposes of the Submerged Lands Act. However if the Court should find that it is not in error in that regard there still remains the question of the effect of the Act of February 19, 1895 when cumulated with other assertions of jurisdiction in establishing Louisiana's historic bay claims. The Court has not ruled upon this point at all. In dismissing the Inland Water Line claim the Court indicated that the drawing of the 1953 line alone could not constitute exercise of jurisdiction over inland waters, but it has not touched upon the effect of the 1895 Act's cumulation with other assertions of jurisdiction over waters asserted to be inland in our alternative line. We feel the Court is in error in not establishing any rules whatever for the guidance of a Special Master through this labyrinth.

If regulation of navigation were never acceptable as evidence of jurisdictional assertions over inland waters on the ground that such regulation is permissible in the territorial sea, it would be logically impossible to prove that any water body is an historic bay. Every incident of sovereignty over inland waters is also an incident of sovereignty over the territorial sea, with the sole exception of the duty of the littoral state to allow foreign vessels innocent passage in the territorial sea, but not in inland waters.

However the Court in treating of Louisiana's primary contention has used language in dictum that may be misinterpreted as applying to her alternative contentions with the consequent possibility that the United States might try to prove that no waters could be historic inland waters contrary to the main thrust of the Court's opinion. We therefore respectfully request that the Court grant a rehearing on this matter to prevent unnecessary complications in proceedings before a Special Master.

The Effect of the Semi-Circle Test

Louisiana respectfully submits that the Court erred in holding that the semi-circle test is only a minimum requirement for a waterbody to qualify as a bay, and that in addition to that test, the waterbody must satisfy other criteria not defined by the Court; that is, that it must also be a "well marked indentation" containing "landlocked waters."

Certainly, these last mentioned standards are set forth in Article 7 of the Convention, and certainly they

are, under the terms of that Article, required characteristics of a bay, from which it follows also that a bay must be more than a mere slight curvature of the coast. However, what the Court may not have understood from our prior arguments is that the semi-circle test is a test for determining whether the indentation is a mere curvature of the coast or a well marked indentation containing landlocked waters.

Article 7, in stating that a "bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the cost" in effect restated subjective standards long recognized in international law. The problem with this subjective definition had been that it, or similar prior general definitions, lacked the specificity needed to prevent international disputes.

> To make the definition more specific, a second criterion was added in paragraph 2, namely: . . . the semicircular rule. . . . 1 Shalowitz *Shore and Sea Boundaries* 219 (1962).

If it can be said that the semi-circular rule does not determine whether a waterbody is more than a mere curvature of the coast containing landlocked waters, then the very reason for the semi-circle test is defeated. There will be no specificity, no certainty in determining whether an indentation is or is not a bay. At the very most, some ratio of depth of penetration to width of mouth might have to be satisfied. But what ratio? Measured from what point on the closing line of the mouth? At what angle?

International law and international relations, not to mention state-federal relations, should not be bedeviled by questions offering such a potential for discord and dispute. But if this regrettable source of friction is indeed called for by the Convention, we should at least be able to look to recognized bays for guidance, to develop at least some small modicum of certainty.

Monterey Bay, which this Court recognized was a bay in *United States v. California*, 381 U. S. 139 (See appendix B to the opinion, 381 U. S. at 213 for map of Monterey Bay), has a ratio of 9.2 miles depth to 19.24 miles width at the mouth, measured at its deepest place by right angle from the closing line opposite that deepest place. This is less than a ratio, of ½ to 1, or to be precise, a ratio of .47 depth to 1 unit of width.

Atchafalaya Bay, which this Court and our opponent has recognized is a bay, does not even have that ratio of depth to width, unless one uses an angle from the closing line other than a right angle or unless one includes the area of the "bays within the bay," such as, East and West Cote Blanche Bays, to determine depth of penetration (which it would seem would be perfectly acceptable in a case where, unlike Monterey Bay, the overall indentation is not neatly at right angles to the closing line but consists partly of bays within the bay lying at an odd angle to the closing line).

Whether one measures at right angles from the closing line of Ascension Bay to arrive at a ratio of at least approximately .6 to 1, or at an angle other than a right angle to arrive at an even higher ratio of .9 to 1

or more, it is perfectly clear that Ascension Bay (including the Barataria Bay complex, which the Court has held forms part of the area of Ascension Bay for measurement purposes) at its deepest point has a depth of penetration to width of mouth ratio well in excess of Monterey Bay.

If it were not proper to include Barataria Bay in the area of Ascension Bay, still the depth of penetration ratio would approximate the ratio in Monterey Bay of slightly less than ½ to 1. (From the shoreline at Charland Pass to the closing line of Ascension Bay on a line at right angles, the ratio at least approximates .45 to 1.)

Even if pronounced headlands are essential, the bay also unquestionably has pronounced headlands. The jetties at both ends are as pronounced as any feature can be. But even if the jetties should not be used, the peninsula of Bayou Lafourche between Timbalier Bay and Ascension Bay, on the west side, and the right bank of Southwest Pass of the Mississippi, on the east side, are very pronounced land forms.

From all of this, it follows that there is no factual problem requiring reference of the Ascension Bay matter to a Special Master, and as a matter of law, the Court can and should now decide in favor of the 24 mile closing line urged by Louisiana in Ascension Bay. If the Court should not so decide now, these same legal contentions will then be urged before the Master, and ultimately the Court will have to pass upon them anyway.

We respectfully submit, too, that the Court erred in not considering the whole of East Bay to be a true bay (in spite of its failure to satisfy the semi-circle test) because the semi-circle test was only designed for normal embayments to test whether they have sufficient penetration in proportion to the width of the mouth to constitute a bay. East Bay is a unique V shaped indentation forming part of the mouth system of a great river, and is actually a highly unique type of indentation that has far more penetration, in proportion to the width of its mouth than bays which have been recognized as true bays, e.g. Monterey Bay.

The plain language of Article 3 of the Convention is to the effect that the articles of the Convention are for the determination of *normal* baselines. It cannot be asserted that the *only* bird foot delta of all the major rivers in the world presents a *normal* baseline determination problem. As Mr. Justice Black and Mr. Justice Douglas pointed out, even the United States has recognized that the Louisiana coastline problem is "an extraordinarily complex one." Memorandum for the United States dated March 5, 1956, pp. 9-10; see note 8 and related text of Mr. Justice Black and Mr. Justice Douglas' dissent. It follows that when the basic bay criteria are so clearly satisfied, the totally unique character of the indentation which makes it fail to meet a limiting test designed for normal type indentations, should not defeat its classification as a bay.

As to the Court's holding that the portion of East Bay which meets the semi-circle test is not necessarily a bay because of that fact alone, but that such portion

of the bay must meet other criteria (which the Court did not decide were present or absent) we respectfully suggest that the Court erred and should reconsider this point.

East Bay is unquestionably a well-marked indentation with a high degree of penetration in proportion to the width of its mouth, even though its area is less than that of a semi-circle using its outermost mouth as diameter. See Louisiana Brief, Part II, page 188 (see also page 184.) The provision in Article 7 (2) that an "indentation" shall not be regarded as a bay unless it meets the semi-circle test at most should be interpreted as applying to a claim that the whole indentation is a bay—not to a claim that some part of it is a bay. If a line can be drawn anywhere within the indention that will meet the definition of a bay such a line should be drawn as a part of the coast line.

Dredged Channels

If this Court refuses to reconsider Louisiana's primary contention that its coastline should be established along the Inland Water Line, and maintains its decision that Louisiana's coast line should be drawn in accordance with the definitions of the Convention on the Territorial Sea and Contiguous Zone, we urge the Court to reconsider its decision on the dredged channels.

While the decision of this Court purports to resolve a dispute between the United States and Louisiana, as it pertains to the dredged channels along the Louisiana coast, the interpretations by this Court of

the provisions of the Convention will govern the establishment of the remainder of the coastline of the United States, its territories and possessions. This places an awesome responsibility on the Court. Even though the United States, represented in this case by the Solicitor General as its advocate, is urging a restricted coastline as it affects Louisiana, nevertheless the Court must look beyond this case to determine what effect its interpretations will have on the coastlines of other States and what effect they will have on the security of this great nation in its dealings with foreign nations in this rapidly changing world. While this Court has held that it is up to the United States to determine if it wants to adopt a straight baseline under Article 4, no such election is provided for in Article 8 which is self-operating. The interpretations placed on Article 8 in this case will bind the United States and restrict it from adopting a different course as to dredged channels in other areas, even though the Department of State may consider dredged channels are inland waters of the United States.

We respectfully suggest to this Court that its observations pertaining to historic inland waters should be equally applicable here in dealing with dredged channels. The fact that the United States, appearing herein through the Solicitor General, to gain a point in this case, is willing to throw portions of the dredged channels into international waters when they have been constructed and maintained, without objection from foreign powers, at great cost to the taxpayers of this country, should cause great concern to this

Court, particularly where this issue is being decided by a divided Court.[2]

Dredged channels occupy to some extent the same status as historic inland waters. They are either inland waters or not inland waters and, therefore, we urge that this issue should be reconsidered by the Court to either adopt the theory of Louisiana or leave the matter open to be considered by a Special Master, who could hear evidence on the proper interpretation and application of Article 8 as it relates to dredged channels, and report back to this Court. The facts may well establish that dredged channels are part of the inland waters of the United States.[3]

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[2] "But, as we suggested in *United States v. California*, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles in the name of its power over foreign relations and external affairs, by denying any effect to past events.[104]

. . .

[104]It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of an historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California*. See n. 97, supra."

[3]The United States, with its unlimited resources, has not produced any authority that dredged channels are not inland waters, nor has it produced evidence where any other nation in the world has not treated dredged channels as inland waters. On the contrary, we have cited to the Court authorities which indicate that dredged channels are inland waters, such as:

In making its determination this Court said: "It is not enough that the dredged channels may be an 'integral part of the harbor system;' even raised structures which fit that description, such as lighthouses, are not considered 'harbor works' unless they are connected with the coast. Thus Article 8 provides that 'harbor works' shall be regarded as forming part of the '*coast*' (Emphasis ours) a description of which hardly fits underwater channels. As part of the coast, the breadth of the territorial sea is measured from the harbor works' low-water lines, attributes not possessed by dredged channels. We must therefore conclude that Article 8 does not establish dredged channels as inland waters."

With due deference to this observation by the Court, we would like to refer the Court to Article 3 of the Convention, which provides in part "except where otherwise provided in these Articles, the *normal* baseline for measuring. . . ." (Emphasis ours). The United States, through the Solicitor General, urged, and this

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(a) *The Delaware*, 161 U. S. 459, in which this Court said, at page 462: "The dredged entrance to a harbor is as much a part of the inland waters of the United States within the meaning of this Act, as the harbor within the entrance . . . ."

(b) Mr. Jack B. Tate, speaking for the Department of State, when Congress was considering the Submerged Lands Act, stated: "A strait or channel, or sound which leads to an inland body of water is dealt with on the same basis as bays." (Louisiana Brief p. 338)

(c) Denmark treats dredged channels as inland waters. (Louisiana Brief p. 343.)

Court accepted, the theory that the word "normal" had no meaning in Article 3 and that the section should be read the same as if the word "normal" had not been included. Article 3 establishes two exceptions, namely, those exceptions provided in the other Articles of the Convention, and second where the baseline is not normal. The only possible explanation for the word "normal" being inserted in the Article is that the drafters were considering normal situations. When this case was argued the Court seemed disturbed by the uncertainty created by the word "normal" for it must be assumed that the able drafters of the Convention were not adding words without some effect.

In the case of *E. W. Bliss Co. v. United States*, D. C. Ohio, 224 F. Supp. 374, 378, the Court held that the word "normal" was derived from the word "norm", which means a rule or authoritative standard, model, type, or pattern, and then went on to hold that the word "normal" means "According to, constituting, or not deviating from, an established norm, rule, or principle; conformed to a type, standard, or regular form; performing the proper functions; not abnormal * * *."

The drafters of the Convention realized there would be abnormal situations not covered by the precise language of the Articles. In those situations a nation would be entitled to adopt some standard different from that in the Articles so long as the standard did not deviate too greatly from the spirit and intent of the Articles. This appears to us as the only reasonable interpretation to be given to the word "normal" in Article 3.

Even though the Convention does not expressly say so, it has been decided by this Court that in ports the baseline of the territorial sea not only follows the outermost permanent harbor works, but also straight lines between such works. This Court, in the *California* case, in the January 31, 1966 decree, in paragraph 4(b), includes in inland waters all the waters of any port, "landward, of its outermost permanent harbor works and a straight line across its entrance." This is a situation in which the Court, in its judgment, followed a reasonable and consistent policy, although not specifically provided for in the Convention.

The drafters of the Article realized that in measuring from the outermost permanent harbor works forming an integral part of the harbor system, you are not necessarily dealing with *low water lines.* As a matter of fact Edouard Jaureguiberry (La Mer Territoriale (Paris, 1932), (p. 157), commenting on an analogous provision approved by a subcommittee of the Hague Conference in 1930, stated that "the baseline in front of ports is a fictitious line traced between the two outermost harbor works." He added that this line "marks the border between the territorial waters and the internal waters of the state which has sovereignty over the port.

The redactors of the Convention were practical international lawyers who realized that in the situations covered by Article 8 you are dealing with fictitious lines traced between the two outermost permanent harbor works forming an integral part of the harbor

system. There is nothing in the Article stating that the works have to be above water.

Gilbert Gidel dealt with port boundaries in his treatise on the international law of the sea (Le Droit International Public de la Mer (Chateauroux-Paris, 1932), Vol. II, pp. 27-28). He prefers the expression "outermost permanent harbour works" used at the 1930 Hague Conference ('ouvrages fixes les plus avancés") to the phrase "outermost harbor works" (travaux extérieurs") suggested in 1928 by Romania. He points out that these permanent harbor works need not be permanently above water, but may be partly or completely submerged, provided they exercise an effective influence on the hydrographic regime of the ports (on the movement of waves, sands and currents). There can be no doubt that these dredged channels affect the current in keeping the channel to the port open.

Dredged channels are permanent. Webster's New Twentieth Century Dictionary (Second Edition) defines "permanent" as follows: "Lasting or intending to last indefinitely without change; continuing in the same state or in the same place; stable; durable; abiding; not subject to obliteration or to removal; opposed to temporary", etc. What could be more permanent than these channels, some of which are dredged to a depth of from 20 to 40 feet below the surface of the Gulf and some 800 feet wide? If inland waters are limited to the end of the jetties, many of these channels will be in international waters.

Since this is a new issue, which could vitally affect the United States, we feel that the Court should give pause before giving finality to its decision on dredged channels in this case, and particularly without considering how the other nations of the world treat their dredged channels.

The Court observed the United States points out that if the channels are really part of the coast within Article 8, their seaward extensions would also serve as headlands from which lines closing indentations could be drawn. Louisiana has not rejected the use of the seaward extensions of the channels as headlands for bay closures, but realizing the fictitious nature of the line across the outermost permanent harbor works, took a conservative view and used the seaward end of the jetties as headlands. It may well be Louisiana is wrong in this approach and that a reconsideration of Article 8, after a Special Master has heard evidence, will demonstrate that the outermost permanent harbor works should be used as headlands for bay enclosures. It is extremely important that the waters between two channels which satisfy the bay closure rule be treated as inland waters. As a matter of fact, there is less than twenty-five miles between the seaward ends of the dredged channels at the Calcasieu and Sabine Passes. It is not for Louisiana or the United States, through the Solicitor General, to give up sovereign territory of the United States, and it is the responsibility of this Court to protect the United States from the loss of sovereign territory by actions of Louisiana and the

Solicitor General of the United States appearing for the United States.

The Court indicated that the harbor works had to be connected with the coast. The dredged channels are connected with the coast and are continuous. It is our understanding that some of the jetties referred to in the *California* case, while starting at the shore are not continuous, but have breaks in them yet they were recognized as harbor works. We mention this to illustrate to the Court the danger of holding that dredged channels are not part of the inland waters of the United States and respectfully urge that this matter should be reconsidered by the Court.

For the above assigned reasons Louisiana respectfully prays that the Court grant a rehearing in the case of *United States v. Louisiana, et al*, Number 9 Original, October Term 1968. I hereby certify that this petition is submitted in good faith and not for delay.

Respectfully submitted,

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